(2)

Supreme Court, U.S.
FILED

04-799 DEC 6 - 2004

OFFICE OF THE CLERK

No._____

In the Supreme Court of the United States

Mary Ann Smania
Petitioner

v.

Sherwin Abrams, *Attorney*
Abrams and Chapman, *Law Firm*
Lawrence Benjamin, *Attorney*
Lawrence Richman, *Attorney*
Neal, Gerber and Eisenberg, *Law Firm*
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Mary Ann Smania
Petitioner, Pro Se
15815 Acorn Circle
Tavares, Florida 32778
(352) 343-8517

INDEX TO APPENDIX

DOCUMENT DESCRIPTION	LOWER COURT DOCKET #	APPENDIX . PAGES
11th Circuit Order on Smania's Motion for Rehearing, etc.		APP A-1 -2
11th Circuit Opinion on appeal		APP B- 1 -7
District Court's Order on Smania's Motion for Reconsideration	65	APP C-1 -2
District Court's Order on defendants' Motions to Dismiss	62	APP D-1 -14
District Court's Order on Smania's Motion for Certification of Interlocutory Appeal	61	APP E-1 - 14
District Court's Order on *de novo* review of prior orders	59	APP-F-1 - 3
District Court's Order to Show Cause	63	APP G-1 -2
Magistrate's Order on Plaintiff's Motions	48	APP H-1 -10

INDEX TO APPENDIX
continued

DOCUMENT DESCRIPTION	LOWER COURT DOCKET #	APPENDIX . PAGES
District Court's *sua sponte* Order on Defendant's Motion for Extension of Time	37	APP I-1 - 2
Magistrate's Order re: recusal	23	APP J-1 -7

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13403-CC

MARY ANN SMANIA,

Plaintiff-Appellant,

versus

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 08 2004
THOMAS K. KAHN
CLERK

SHERWIN ABRAMS, Attorney,
ABRAMS AND CHAPMAN, Law Firm,
LAWRENCE BENJAMIN, Attorney,
LAWRENCE RICHMAN, Attorney,
NEAL, GERBER AND FISENBERO,
Law Firm,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19 ,
____F.2d____

Before: EDMONDSON, Chief Judge, CARNES and HULL, Circuit Judges.

PER CURIAM:

ORD-42
(12/01)

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. EDMONSON
Chief Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13403
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 042004
THOMAS K. KAHN
CLERK

D. C. Docket No. 03-00104-CV-ORL-31-JGG

MARY ANN SMANIA,

Plaintiff-Appellant,

versus

SHERWIN ABRAMS, Attorney,
ABRAMS AND CHAPMAN, Law Firm,
LAWRENCE BENJAMIN, Attorney,
LAWRENCE RICHMAN, Attorney,
NEAL, GERBER AND EISENBERG,
Law Firm,

Defendants-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

(February 4, 2004)

Before EDMONDSON, Chief Judge, CARNES and HULL, Circuit Judges.

PER CURIAM:

Mary Ann Smania, proceeding pro se, appeals the district court's dismissal of her legal malpractice action against three Illinois lawyers and the two law firms at which they practice. No reversible error has been shown; we affirm.

Smania, a Florida resident, initiated this diversity legal malpractice action against Sherwin Abrams, Abrams & Chapman (the law firm at which Abrams practices), Lawrence Benjamin, Lawrence Richman and Neal, Gerber & Eisenberg (the law firm at which Benjamin and Richman practice). Smania was a beneficiary of the estate of her father, Paul Smania. On Paul Smania's death in 1998, the executor of Paul Smania's Will began probate proceedings in Florida but two days later moved the proceedings to Illinois. Defendant Abrams acted as legal counsel to the estate after probate proceedings were moved to Illinois. Although Paul Smania declared himself to be a resident of Florida in 1990, it appears that his Will was signed and recorded in Illinois.

Smania took issue with acts done by the executor and amounts paid by the estate to Abrams. Smania also took issue with the legal services rendered by Benjamin and Richman, who

had been engaged to defend the Paul Smania charitable remainder unitrust ("CRUT") in certain litigation the genesis of which Smania tied to acts of Abrams and the executor. Eventually Smania became convinced that Abrams had rendered poor advice and was conflicted in his representation of the estate; Smania also came to believe that Benjamin and Richman were complicit with Abrams. Smania named the three lawyers and the two law firms in her legal malpractice complaint.

Abrams received personal service of process and also accepted service on behalf of Abrams & Chapman.[1] Neal, Gerber & Eisenberg waived personal service pursuant to Fed.R.Civ.P. 4(d), though Benjamin and Richman did not. The process server left process for Richman and Benjamin with a secretary at Neal, Gerber & Eisenberg. All defendants moved to dismiss arguing, among other things, that the district court lacked personal jurisdiction. Defendants Benjamin and Richman also moved to dismiss based on insufficient service of process.

The district court found and concluded that no proper service of process on Benjamin and Richman had occurred; it ordered dismissal of the action against those defendants on that basis. The district court also concluded that (i) no personal jurisdiction over the lawyers or their law firms

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[1] The record also contains a copy of a waiver of service signed by Abrams and "Abrams and Chapman."

existed under the Florida long-arm statute, Fla. Stat. § 48.193(1)(a) & (b), and (ii) the exercise of personal jurisdiction over the defendants would not comport with due process.

About the dismissal of Benjamin and Richman based on insufficient service, Smania complains that the district court erred by failing to compel them to waive formal service of process. Smania cites -- correctly -- the duty imposed by the Federal Rules of Civil Procedure on defendants to "avoid unnecessary costs of serving the summons." Fed.R.Civ.P. 4(d)(2). To avoid service costs, the plaintiff is permitted to request the waiver of formal service. Id. If the defendant fails to effect a timely waiver of service, "the court shall impose the costs subsequently incurred in effecting service upon the defendant." Id. The rules contemplate formal service upon a defendant who fails to waive service, albeit at the defendant's expense. See Fed.R.Civ.P. 4(d) and (e). Fed.R.Civ.P. 4(e) addresses specifically the acceptable methods for effecting service upon persons "from whom a waiver has not been obtained." Cf. African Methodist Episcopal Church. Inc. v. Ward, 185 F.3d 1201, 1202 (11th Cir. 1999) (stating in dicta that plaintiff "had to" effect formal service when no waiver of process was received). The rules impose liability for the costs of service on a defendant who necessitates formal service by failing to waive service; no provision is made for compelling waiver.

We see no error in the district court's

conclusion that it lacked personal jurisdiction over the defendants. See Mandara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990) (dismissal for lack of personal jurisdiction subject to de novo review). The district court reviewed carefully the Florida long-arm statute, Fla. Stat. § 48..193(1)(a) & (b), and concluded no personal jurisdiction had been established over these defendants. To fall within the conducting business element of the Florida long-arm statute, "[t]he activities of the person sought to be served ...must be considered collectively and show a general course of business activity in the State for pecuniary benefit." Diusmore v. Martin Blumenthal Associates. Inc., 314 So.2d 561, 564 (Fla. 1975) (interpreting predecessor Fla. Stat. § 48.193(1)(a)). Thc defendants were not licensed to practice law in Florida and had no offices, mailing address, or other indicia of doing business in Florida.

Smania does not appear to argue personal jurisdiction under the doing business element; instead, Smania argues that the district court concluded wrongly that the tortious act element, Fla. Stat. § 48.193(1)(b) failed to confer personal jurisdiction. The tortious act element requires no physical presence within Florida: "telephonic, electronic, or written communications into Florida may form the basis for personal jurisdiction under section 48.193(1)(b) if the alleged cause of action arises from the communications." Wendt v. Horowitz, 822 So.2d 1252, 1260 (Fla. 2002). If Smania's complaint alleged sufficient facts to state a valid cause of action, personal jurisdiction may

be predicated on the tortious act element if the cause of action arose from communications into Florida.

Smania's complaint alleged that Abrams was conflicted in his representation and charged her father's estate exorbitant fees. Smania also complained about acts Abrams took in transferring certain property in Illinois to a charitable remainder unitrust. Smania claimed that' this transfer resulted in a tax deduction to the estate that she characterizcd as "questionable," and that left her, as beneficiary of the estate, "in harms way" with the IRS. But the complaint does not allege -- and Abrams denies -- that he represented Smania personally.

Under Florida law, a legal malpractice complainant must plead and prove, among other things, the lawyer's employment. See Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999). As a general rule, attorney liability for professional negligence extends only to clients with whom they share privity of contract. Angel, Cohen & Rogovin v. Oberon Invest.. N.V., 512 So.2d 192, 194 (Fla. 1987). Some limited exception to the privity requirement is recognized to third-party beneficiaries of testamentary documents to bring a malpractice action against the testator's attorney if the testamentary documents make clear that the third-party was the intended beneficiary of the attorney-client relationship. See Espinosa v. Sparber. Shevin et al., 612 So.2d 1378, 1380 (Fla. 1993) ("a limited exception to the strict privity

commission of a tortious act in Florida by Benjamin, Richman, their law firm or employees of their law firm. The acts about which Smania complains are tied to no communications into Florida; instead, the crux of Smania 's complaint against Neal, Gerber & Eisenberg is that they failed to take legal action against Abrams in Illinois and committed other acts in Illinois to which she objects.

In sum, we see no error in the district court's conclusion that Smania failed to establish personal jurisdiction over defendants in Florida.[2]

After consideration of all of Smania's allegations of error, we conclude that no reversible error has been shown.

AFFIRMED.

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[2] Because the Florida long-arm statute conferred no personal jurisdiction over any of the defendants, we need not determine whether the exercise of personal jurisdiction would have satisfied the Due Process Clause. See Mandara, 916 F.2d at 1514 (due process analysis undertaken when basis for assertion of personal jurisdiction under the long-arm statute satisfied).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-3IJGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICUMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause comes before the Court on Plaintiffs Motion for Reconsideration (Doc. 63) pursuant to Federal Rule of Civil Procedure 60(b)(6) and Defendants' Response (Doc. 64). In her motion, Plaintiff seeks reconsideration of this Court's Order (Doc. 62) which dismissed her case for insufficiency of service of process, lack of personal jurisdiction over the Defendants, and alternatively for improper venue. The Court has carefully considered the motion, the accompanying memoranda, and is otherwise fully advised in the premises.

In support of her motion, Plaintiff asserts that this Court overlooked several facts which justify this Court changing or vacating its Order dismissing her case. The Court has considered the purported factual errors upon which Plaintiff relies and finds that even after considering those facts, this does not change the

conclusion of the Court that dismissal was proper for insufficient service of process, lack of personal jurisdiction over the Defendants, as well as improper venue.[1]

Accordingly, it is therefore

ORDERED AND ADJUDGED that Plaintiffs Motion (Doc. 63) is DENIED. The Clerk is directed to close this case.

DONE and ORDERED in Chambers, Orlando, Florida this day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

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[1] Plaintiff's legal claims are not foreclosed by this Order. If Plaintiff still wishes to pursue this action, Plaintiff must effect proper service of process on the Defendants, and file her suit in a court in which venue is proper and where the court can exercise personal jurisdiction over them.

FILED
03 JUN - 5 PM 1:31
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-3IJGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERT,
Defendants.
_____/

ORDER

This cause comes before the Court on Defendants, Abrams' and the law firm of Abrams and Chapman's, Motion to Dismiss (Doc. 26, filed Mar. 31, 2003), Plaintiffs Response, titled Motion for More Definite Statement (Doc. 44, filed Apr. 11, 2003), Defendants, Richman's, Benjamin's, and the law firm of Neal, Gerber, and Eisenberg's Motion to Dismiss (Doc. 27, filed Apr. 1, 2003), Plaintiffs Renewed Motion to Recover Costs (Doc. 43, filed Apr. 11, 2003), which included argument in opposition to Richman's, Benjamin's, and the law firm of

Neal, Gerber, and

Eisenberg's Motion to Dismiss, and Benjamin's Declaration (Doc. 29, filed Apr. 1, 2003).[1] The Court has carefully considered the parties' motions and responses, including the attachments and supporting affidavits, exhibits, and declarations, the complaint, the argument of the parties, the
applicable law, and is otherwise fully advised in the premises.

I. INTRODUCTION AND BACKGROUND FACTS

Plaintiff, Mary Ann Smania, filed suit against Defendants, Sherwin Abrams, Abrams and Chapman, Lawrence Benjamin, Lawrence Richman, and Neal, Gerber, and Eisenberg, for legal malpractice arising from their representation of Smania's deceased father's estate, the various executors of the estate, and the trustees of the Paul Smania Trust and the various trustees of the estate. In their motion, Defendants, Abrams and the law firm of Abrams and Chapman, seek dismissal for improper venue, lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim. Similarly, Defendants, Benjamin, Richman, and the law firm of Neal, Gerber and Eisenberg, aver that the complaint should be dismissed for lack of personal jurisdiction and insufficiency of service of process. They also assert that this case should be transferred to the Northern District of Illinois and alternatively seek to compel arbitration.

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[1] Both this Court and the Magistrate Judge elected to treat Plaintiffs Motions (Does. 43 & 44) as Responses in opposition to the Defendants' Motions to Dismiss. (See Orders, Docs. 48 & 59).

I. MOTION TO DISMISS FOR INSUFFICIENCY OF PROCESS

In their motion, Benjamin and Richman argue that service of process was improper under Florida law,[2] Illinois law,[3] or Rule 4(e)(2) because the returns of service showed that service on Richman and Benjamin was made by serving a secretary of the law firm of Neal Gerber, and Eisenberg. Rule 4 provides:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of

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[2] Fla. Stat. § 48.031.

[3] Ill. Code. Ch. 735, § 5/2-203.

process.

Likewise, under both Illinois law and Florida law personal service or service by leaving a copy of the summons and complaint at the individual's dwelling house or usual place of abode is required. Fla. Stat. 48.031; Ill. Code. Ch. 735, 5/2-203.[4]

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[4] Because the Defendants are residents of Illinois, the Illinois Code is applicable. Section 5/2-203 of the Illinois Code provides in relevant part:

> (a) Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. . .

However, even if this Court applied Florida law instead of Illinois law, the result would be the same. Section 48.031, Florida Statutes states in pertinent part:

> (l)(a) Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15

Here, the return of service indicates that service was made on Benjamin and Richman by serving a copy of the summons and complaint on a secretary at the law office of Neal, Gerber, and Eisenberg. Therefore service was insufficient under any of the applicable laws and dismissal without prejudice is proper.

II. MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

A. Legal Standards

A plaintiff has the burden in alleging personal jurisdiction to plead sufficient material facts to establish the basis for exercise of such jurisdiction. **Future Technology Today. Inc. v. OSF Healthcare Sys.**, 218 F.3d 1247, 1249 (11th Cir. 2000) (citing Prentice v. Prentice Colour. Inc.,779 F. Supp. 578, 583 (M.D. Fla. 1991)).

> First, the plaintiff must allege sufficient facts in his complaint to initially support long arm jurisdiction before the burden shifts to the defendant to make a prima

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> years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.
> (b) Employers, when contacted by an individual authorized to make service of process, shall permit the authorized individual to make service on employees in a private area designated by the employer.

> facie showing of the inapplicability of the statute. If the defendant sustains this burden, the plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations in the complaint.

Id. (citing Prentice, 779 F. Supp. at 583 (citations omitted)). Once the plaintiff pleads sufficient material facts to support the exercise of in personam jurisdiction, the burden shifts to the defendant to challenge the plaintiffs allegations by affidavits or other competent evidence. Prentice, 779 F.Supp. at 585-86. If the defendant sustains this burden, the plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations contained in the complaint. Id. at 586.

The uncontroverted evidence regarding the parties' residences is as follows. Smania is a resident of the State of Florida. Smania's father's estate was administrated and admitted to probate in Illinois pursuant to a will apparently signed and recorded in Illinois, despite Paul Smania's declaration of domicile in Florida filed in 1990. Further, the trustees of the Paul Smania Trust and executors of the probate estate were all Illinois residents. Additionally, the three attorney Defendants, Abrams, Richman, and Benjamin, are residents of Illinois. The law firm of Abrams and Chapman is a general partnership, and its only offices are in Chicago, Illinois. The law firm of Neal, Gerber, and Eisenberg, operates from its offices in Chicago, Illinois. Defendants are not licensed to do business in Florida, are not members of The Florida Bar, and do not maintain an

office in Florida.

B. Analysis

In deciding the issue of personal jurisdiction in a diversity case, a court must conduct a two-part inquiry. Future Technology, 218 F.3d at 1249 (citing Sculptchair. Inc. v. Century Arts, Ltd., 94 F.3d 623 (11th Cir. 1996)); Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 919 (11th Cir. 1989); see also Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (holding that where federal jurisdiction is based on diversity of citizenship, federal courts cannot entertain a claim if the courts of the forum state could not entertain the same claim). First, the court must determine whether the applicable state statute governing personal jurisdiction is satisfied, in this case, section 48.193, Florida Statutes. Id (citing Sculptchair, 94 F.:3d at 626). If the requirements of the long-arm statute are satisfied, then the court must inquire as to (1) whether defendant has established sufficient "minimum contacts" with the state of Florida; and (2) whether the exercise of this jurisdiction over defendant would offend "traditional notions of fair play and substantial justice" under International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), and its progeny.[5]

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[5] There are two types of personal jurisdiction: general and specific. Helicopteros Nacionales de Colombia, SA. v. Hall, 466 U.S. 408, 414-15 n.8 & n.9 (1984). General jurisdiction arises as a result of a party's substantial or "continuous and systematic" contacts with the forum state that are unrelated to the litigation. Perkins v. Benguet Consol. Mm. Co., 342 U.S. 437, 438 (1952); Williams Elec. Co. v. Honeywell, Inc., 854 F.2d 389, 392 n.2 (11th Cir. 1988) (citing Sea Lift, Inc. v. Refinadora Costarricense de Petrolco, SA., 792 F.2d 989, 992(11th Cir. 1986)). While

Future Technology, 218 F.3d at 1249 (citing Sculptchair, 94 F.3d at 630-31) (quoting International Shoe, 326 U.S. 310); Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990). Only if both prongs of the overall jurisdictional test are satisfied, in this case Florida's long-arm statute and the due process analysis, may the court exercise personal jurisdiction over nonresident defendants. Madara, 916 F.2d at 1514.

1. Florida's Long-arm Statute

Although Smania has made no allegations concerning personal jurisdiction, it appears that she is asserting that the requirements of the Florida long-arm statute are met by virtue of Defendants conducting business within the State and committing the tort of legal malpractice in Florida.[6] See Fla. Stat. § 48.193(1)(a) & (b). Sections 48.193(1)(a) & (b) of the Florida long-arm statute state in pertinent part:

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there exists no clear methodology for analyzing general jurisdictional problems "[w]hat is certain is that although minimum contacts suffice in and of themselves for specific jurisdiction, the standard for general jurisdiction is considerably more stringent." Prentice, 779 F. Supp. at 583-84 (citing Glater v. Eli Lilly & Co., 744 F.2d 213 (1st Cir. 1984)). Specific jurisdiction, on the other hand, is exercised when the suit arises out of or is related to a party's single or isolated contacts with the forum. Helicopteros, 466 U.S. at 414. Jurisdiction under a state's long-arm statute is the practical equivalent of specific jurisdiction.

[6] Although the Court has already determined that service of process was insufficient as to Richrnan and Benjamin, the Court will nevertheless analyze whether it has personal jurisdiction overall of the Defendants.

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
> (b) Committing a tortious act within this state.

Fla. Stat. § 48.193(1)(a) & (b). The reach of the Florida long-arm statute is a question of Florida law, thus, the court must construe it as would the Florida Supreme Court. Madara, 916 F.2d at 1514. Florida's long-arm statute "is strictly construed, and the person invoking jurisdiction under
it has the burden of proving facts which clearly justify the use of this method of service of process." Oriental Imports & Exports. Inc. v. Maduro & Curiel's Bank. N.V., 701 F.2d 889, 891 (11th Cir. 1 983) (citations omitted).

The undisputed evidence shows that none of the Defendants are licensed to do business in Florida. Nor do they have any offices, employees, officers, property, telephone numbers, or mailing addresses in Florida. Accordingly, personal jurisdiction is not available under section 48.193 (1)(a).

The Defendants also assert that they have not committed a tortious act in Florida. On the other hand, Smania appears to argue that Defendants committed legal malpractice in Florida because correspondence was sent back and forth to Smania in Florida and the probate estate was originally opened in Florida. To fall within the "tortious act" aspect of Florida's long-arm statute, a defendant must have committed a "'substantial aspect of the alleged tort in Florida' by establishing that the activities in Florida 'w[ere] essential to the success of the tort.'" Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 857 (11th Cir. 1990) (citing Williams Elec. Co., Inc. v. Honeywell, Inc., 854 F.2d 389, 394 (11th Cir. 1988) (quoting Watts v. Haun, 393 So.2d 54, 56 (Fla. 1st DCA 1981))). Importantly, the statute requires that the defendant "personally" perform the acts or omissions giving rise to personal jurisdiction. Doe v. Thompson, 620 So.2d 1004, 1005-06 (Fla. 1993) (citing American Heritage Dictionary 926 (2d col. ed. 1985) ("'Personally' means: 'In person; without the intervention of another.'"); see Fla. Stat. 48.193.

Here, the affidavits and exhibits submitted by the Defendants indicate that Smania was not a client of the Defendants, she only agreed to guarantee payment for the legal representation of one of the executors of the estate, not to any legal representation of herself, and she paid for that legal representation after receiving copies of invoices. Indeed, at least one letter indicates that Smania had her own attorney and she would be filing papers against the trustee and the executor in various venues. Even under a generous and liberal reading of the complaint, it cannot be said that the Defendants created any substantial aspect of the alleged tort of legal malpractice in Florida.

2. Due Process

Although the Court has determined that the requirements of the Florida long-arm statute are not satisfied, the Court will still consider whether the exercise of personal jurisdiction over the Defendants comports with due process under federal constitutional law. "The first prong of this second, constitutional, phase of the Court's jurisdictional analysis asks the Court to consider whether the defendant has purposefully established certain minimum contacts with the forum state out of which the instant action arises." Hoechst Celanese Corp. v. Nylon Eng'g Resins, Inc ., 896 F. Supp. 1190, 1193 (M.D. Fla. 1995) (citing Asahi Metal Indus. Co. v. Superior Ct. of Calif., Solano County, 480 U.S. 102, 108-09 (1987)). The second prong requests the Court to determine whether the assertion of such jurisdiction offends "traditional notions of fair play and substantial justice." Madara, 916 F.2d at 1515-16 (quoting International Shoe, 326 U.S. at 316).

The key to any constitutional inquiry into personal jurisdiction is foresecability. Sun Bank, N.A. v. E.F. Hutton & Co., Inc., 926 F.2d 1030, 1034(11th Cir. 1991) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)). To be subject to the jurisdiction of a foreign state, a defendant must purposefully establish sufficient minimum contacts with that state so "that he should reasonably anticipate being haled into court there." Id. (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Burger King, 471 U.S. at 474). The nature of the activities that can constitute such minimum contacts frequently has been explained in the language of Hanson v. Denckla, 357 U.S. 235, 253 (1958): "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of

conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id Asahi, 480 U.S. at 112 ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposely directed toward the forum State") (citations omitted). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts. . . ." Burger King 471 U.S. at 475 (quoting Keeton v. Hustler Magazine, 465 U.S. 770, 774 (1984); World-Wide Volkswagen, 444 U.S. at 299).

According to the Defendants, no business, other than a personal meeting and the exchange of letters discussing the representation of one of the executors to the Smania estate and the guarantee of payment for this representation, occurred between Smania and the Defendants. All legal representation of the executors, the estate, and the trustees of the Smania trust occurred in Illinois, including the administration of the probate estate and a suit involving the Smania trust. There is absolutely no evidence to suggest that Defendants made any deliberate and purposeful contacts in Florida by which they could be expected to be haled into court. Furthermore, the Defendants did not conduct any business in or direct its activities at the residents of Florida. Therefore, the Court finds that the Defendants lack sufficient minimum contacts with Florida to support this Court's exercise of personal jurisdiction.

Nevertheless, the Court will go on to consider whether considerations of fair play and substantial justice counsel permitting the exercise of personal jurisdiction over the Defendants even though their contacts with Florida

ordinarily would not permit it. Sun Bank, 926 F.2d at 1034-35 (citing Burger King, 471 U.S. at 477). Relevant factors to this analysis include:

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiffs interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies.

Burger King, 471 U.S. at 477 (internal quotation marks omitted); Asahi, 480 U.S. at 113; Madara, 916 F.2d at 1517.

These factors do not mandate a different result. Illinois, not Florida, has an obvious special interest in adjudicating this suit involving the alleged malpractice by Illinois lawyers arising from the legal representation of a probate estate and the administration of a trust in Illinois. Moreover, as to the last two factors, there is nothing unusual or special about this case which would justify lessening the ordinary minimum contacts threshold to ensure fundamental fairness. Therefore, this Court finds that it does not have personal jurisdiction over the Defendants and dismissal would be appropriate.[7]

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[7] Because this Court does not have personal jurisdiction over the Defendants, it is unnecessary to address the other arguments raised in the Defendants' motions. However, it appears that venue is improper in the Middle District of Florida and that the only proper place to bring this

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants' Motions to Dismiss (Docs. 26 & 27) are **GRANTED.**

DONE and **ORDERED** in Chambers, Orlando, Florida this 5th day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

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suit would be the Northern District of Illinois. See 28 U.S.C. § 1391(b).

FILED
03 JUN - 5 AM 8:43
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-I 04-Orl-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause comes before the Court on Plaintiff's pro se Motion for Certification of an Interlocutory Appeal (Doc. 54), Plaintiff's pro se Notice of Intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52), which this Court elected to treat as objections to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying

Plaintiffs various motions, and Defendants' Response (Doc. 58) to Plaintiff's Motion. The Court has conducted a *de novo* review of the Orders and in doing so has carefully read and considered the complete record including all of the papers, pleadings, motions, responses, affidavits, and exhibits, the argument of the parties, and the applicable law.

I. INTRODUCTION

Plaintiff, Mary Ann Smania, filed suit against Defendants, Sherwin Abrams, Abrams and Chapman, Lawrence Benjamin, Lawrence Riehman, and Neal, Gerber and Eisenberg, for legal malpractice arising from their representation of Smania's deceased father's estate, the various executors of the estate, and the trustees of the Paul Smania Trust. During the course of this litigation, various motions have been filed by parties. Pursuant to Federal Rule of Civil Procedure 72(a) and 28 U.S.C. §636(b)(1)(A), these motions were referred to the Magistrate Judge, randomly assigned to this case, by this Court for issuance of a decision.[1] As a result, several decisions were rendered by the Magistrate Judge, to which Smania objects. The issues addressed in Smania's objections and those decisions will be addressed in turn.

II. BACKGROUND FACTS

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[1] It should be noted that neither Plaintiff nor the Defendants in this case have consented under Federal Rule of Civil Procedure 73 to a trial of all issues by the Magistrate Judge. No consent by the parties is required for matters referred to a magistrate judge under §636(b)(1)(A) and Rule 72.

On January 27, 2003, Smania filed her Complaint (Doc. 1) with the Clerk. That same day, the Clerk issued summonses for Defendants Abrams, the law firm of Abrams and Chapman, Benjamin, Richman, and the law firm of Neal, Gerber, and Eisenberg, and gave them to Smania for service. At that same time, Smania also requested waiver of service forms. (Pl. Aff. at 1, ¶ 3). On January 29, 2003, Smania sent waivers of service to each of these Defendants via certified mail. (Id. at 2, ¶ 5).

On February 24, 2003, Smania received a waiver of service from the law finn of Neal, Gerber, and Eisenberg, which she filed with the Court on February 27, 2003 (Doc. 8). (Id. at 2, ¶ 8). Despite receiving a return receipt from each of the waivers of service sent, Smania received no other waivers of service.[2] Smania then sought to have summonses served on Abrams, the law firm of Abrams and Chapman, Benjamin, and Richman. On March 5, 2003, Smania filed returns of service for Abrams, the law firm of Abrams and Chapman, Benjamin, and Richman. (Docs. 9-12). According to the returns of service, Abrams and the law firm of Abrams and Chapman were served on March 4, 2003, and Benjamin and Richman were served on March 3, 2003. Thus, answers to the complaint were purportedly due on March 23rd for Richman and Benjamin, and March 24th for Abrams and the law firm of Abrams and Chapman.

On March 26, 2003, Benjamin and Richrnan filed a

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[2] On March 19, 2003, Smania did receive a copy of a waiver of service from Abrams and the law firm of Abrams and Chapman (see Doc. 15 at attach.), which was dated January27, 2003.

motion with memorandum (Doc. 17) to extend time to Monday, April 31, 2003 (sic) to respond to the complaint. On March 27, 2003, Smania filed motions for default against Abrams, the law firm of Abrams and Chapman, Benjamin, and Richman. (Docs. 18-22). In their motion, Benjamin and Richman argued thatservice of process was improper under Florida law,[3] Illinois law,[4] or Rule 4(e)(2) because the returns of service showed that service on Richman and Benjamin was made by serving a secretary of the law firm of Neal, Gerber, and Eisenberg. On March 31, 2003, Smania filed a Response (Doc. 25) stating that she opposed the extension of time and arguing that because they were
attorneys, Richman and Benjamin had a duty and obligation to sign and return the waiver of service to save the costs of service. In her Response (Doc. 25), Smania also sought costs for service; but, she did not state an amount of such costs.

On April 1,2003, the Magistrate granted by endorsed order Riebman's and Benjamin's motion (Doc. 31) to respond to the complaint on April 31, 2003. On April 4, 2003, upon a *sua sponte* review of the file, this Court vacated that Order (Doc. 31) because April does not have 31days. (Doc. 37). The Court then granted the motion and allowed Richman and Benjamin until May 1,2003 to respond. (Id..).

Also, on March 31, 2003, Abrams and the law firm of Abrams and Chapman filed a motion to dismiss (Doc. 26). On April 1, 2003, Richman, Benjamin. and the law firm of Neal, Gerber, and Eisenberg filed their Motion to Dismiss

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[3] Fla. Stat. §48.031.

[4] Ill. Code. Ch. 735, § 5/2-203.

(Doc. 27). That same day, Benjamin filed a Declaration (Doc. 29) in support of the Motion to Dismiss. On April 11, 2003, Smania filed a Renewed Motion to Recover Costs (Doc. 43), which included argument in opposition to Richman's, Benjamin's, and the law firm of Neal, Gerber, and Eisenberg's Motion to Dismiss; a Response, titled Motion for More Definite Statement (Doc. 44), to Abrams' and the law firm of Abrams and Chapman's Motion to Dismiss; and a Motion to Strike (Doc. 45) Benjamin's Declaration. On April 14, 2003, Benjamin and Richman filed a Memorandum in opposition to the Motion for Default (Docs. 20 & 21). On April 17, 2003, Benjamin and Richman filed a Memorandum in opposition to the Motion to Recover Costs for Service (Doc. 47).

On April 24, 2003, the Magistrate Judge entered an Order (Doc. 48) denying Smania's Motions for Default (Docs. 18-21), the Motion for Costs of Service (Docs. 25 & 43) without prejudice, and the Motion for More Definite Statement (Doc. 44). On April 28, 2003, Benjamin and Richman filed a Memorandum (Doc. 49) in opposition to Smania's Renewed Motion for Costs (Doc. 43) and a Memorandum (Doc. 50) in opposition to Smania's Motion to Strike Benjamin's Declaration (Doc. 29).

On May 7, 2003, Smania filed a Motion for Certification of an Interlocutory Appeal (Doc. 54). Then, on May 15, 2003, she filed a Notice of Intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52). This Court elected to treat both papers as objections to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying Plaintiffs various motions. (See Order Doc. 59).

III. DISCUSSION

A. Treatment of Smania's Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a Motion for Recusal

Smania asserts in her various papers (Doc. 13 at ¶¶ 10-11) that she never filed a motion for recusal and was perplexed as to why the Magistrate Judge set a hearing on a motion that she had not formulated, before any of the defendants had appeared in the suit. As the Magistrate Judge explained to Smania in the hearing he held on March 25, 2003, he, as a matter of practice, sets hearings when it appears the parties are raising anything related to recusal to determine whether the parties are indeed seeking recusal or if recusal is required. The Court finds that there is nothing wrong with this practice and indeed it appears that it addresses any recusal issues at the earliest possible stage of the proceedings. Furthermore, the Court has read Smania's Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4, filed Feb. 3, 2003) and finds that on page two, paragraph 5, Smania states that "[she] believes that there is a basis for recusal of the Magistrate Judge James G. Glazebrook." Accordingly, there is no error in the Magistrate Judge treating Smania's Certificate (Doc. 4) as a motion for recusal.[5]

B. Order (Doc. 31) Granting of

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[5] Although not before this Court, if asked to determine whether recusal was required under the facts alleged, this Court would conclude that recusal was not required.

Defendants, Benjamin's and Richman's, Motion for Extension of Time to Respond

Smania claims that the Magistrate Judge erred by granting Benjamin's and Richman's Motion (Doc. 17) for Extension of Time to Respond to the Complaint (Doc. 1). The record shows that although the Magistrate Judge nor this Court gave any reasons for granting the extension of time, it is clear that an extension was not improper because Richman and Benjamin had not been properly served by Smania. Rule 4 provides:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Furthermore, under both Illinois law and Florida law personal service or service by leaving a copy of the summons and complaint at the individual's dwelling house or usual place of abode is required. Fla. Stat. 48.031; III. Code. Ch. 735, § 5/2-203.[6]

C. Order (Doc. 48) Denying Motions (Docs. 18-22) for Default Judgment

Smania contends that Abrams, the law firm of Abrams and Chapman, Richman, and Benjamin have defaulted because they did not respond to her complaint by March 24, 2003. Rule 55 of the Federal Rules of Civil Procedure governs the procedure for obtaining a default judgment. Rule 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or

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[6] Section 5/2-203 of the Illinois Code provides in relevant part:

> (a) Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. . .

otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). Thereafter, a party may seek a default judgment from either the district judge or the clerk of the court, depending upon whether the damages are for a "sum certain" or not. Fed. R. Civ. P. 55(b). Thus, entry of default by the clerk is a prerequisite to moving for a default judgment. Fed. R. Civ.P. 55(a); Local Rule 1.07(b).

Moreover, a motion for the court's entry of judgment by default is not granted as a matter of right, and in fact is judicially disfavored. Patray v. Northwest Pub., Inc., 931 F. Supp. 865, 868(S.D. Ga. 1996) (citing 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure Civil 2d §§ 2681, 2685); see Wahl v. Mclver, 773 F.2d 1169, 1174 (11th Cir. 1985) (default judgment should only be used in extreme situations). That is why Rule 55(b)(2) vests the court with judicial discretion in determining whether the judgment should be entered. Patrav, 931 F. Supp. at 868 (citing Wright, et al, § 2685 at 421 (citing Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977))). For a default judgment to be entered, there must be a sufficient basis in the pleadings and the judgment cannot stand on a complaint that fails to state a claim. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1371 n.41 (11th Cir. 1997) (citations omitted).

As the Magistrate Judge correctly determined, Smania did not move for entry of default by the Clerk. Therefore, her Motions for Default Judgment (Docs 18-21) were properly denied. Furthermore, a party cannot be in default if he has not been properly served. Hence, default judgment could not have been entered against Richman and Benjamin. Finally, Richman and Benjamin were given until May 1, 2003 to respond and they flied a motion to dismiss on March31, 2003. Thus, they could not have been in default for failing to answer the complaint.

D. Order (Doc. 48) Denying Smania's Motions to Recover the Costs of Service (Docs. 25 & 43).

In her Motions, Smania asserted that she was entitled to recover the costs of service because the Defendants had a duty to sign the waiver of service. and save the costs of service. Rule 4(d) provides in relevant part:

> (2) An individual, corporation, or association that is subject to service under subdivision (e). (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons....

Fed. R. Civ. P. 4(d)(2). Furthermore,

> [i]f a defendant. . . fails to comply with a request for waiver made by a plaintiff. . . ,the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown. . . . (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h) . .

Fed. R. Civ. P. 4(d)(2), (5)[7]

The Magistrate's Order indicates that he denied Smania's motion for costs without prejudice to refile at the close of the case because she failed to comply with Local Rule 3.0 1(g) and because she did not delineate the amount of costs she incurred in serving the Defendants. Local Rule 3.01(g) requires that

> Before filing any motion in a civil case, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action, the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion and shall file with the motion a statement (1) certifying that the moving counsel has conferred with opposing counsel and (2) stating whether counsel agree on the resolution of the motion...

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[7] Although it is the duty of the law firm and arguably any attorney to waive service and thereby minimize a plaintiffs costs, this duty is not such that it creates a legal obligation to do so. Rather, should the defendant who has been asked to waive service unreasonably refuse, he or she must pay for the costs of service. In no case, does this obligation create a method for a plaintiff to obtain a default judgment if service is not waived.

Local Rule 3.01(g). A review of Smania's Motions to Recover the Costs of Service (Docs. 25 & 43) reveals that there is no statement indicating that she conferred with counsel for the Defendants.[8] Additionally, Smania did not state the amount she sought to recover in her Motion. Thus, denial was proper. Furthermore, the Magistrate Judge did not permanently foreclose Smania from recovering her fees. Rather, she must now wait until the conclusion of the case to seek recovery. Accordingly, there was no error.[9]

E. Order (Doc. 48) Denying Smania's Motion for a More Definite Statement (Doc. 44)

In her Motion (Doc. 44), Smania claimed that she needs more specificity pursuant to Rule 12(e) from Abrams in his affidavit filed in support of Abrams' and the law firm of Abrams and Chapman's Motion to Dismiss (Doc. 26). A motion for a more definite state is available to a party when a pleading is so vague or ambiguous that a responsive pleading cannot be framed. Fed. R.Civ. P. 12(e). Pleadings consist of a complaint and

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[8] In her various papers and motions, Smania also complains that the Defendants did not comply with Local Rule 3.01(g) before filing their motions to dismiss. However, no certification is necessary for dispositive motions. Local Rule 3.01(g).

[9] The Magistrate Judge's Order also reflects that he correctly treated the balance of Smania's Motion as a memorandum in opposition to Richman's, Benjamin's, and the law firm of Neal, Gerber,and Eisenberg's Motion to Dismiss. This Court also did the same. See Order (Doc. 59).

answer, reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. Fed. R. Civ. P. 7(a). Under the Rules, a motion is not a pleading, nor is an affidavit. Fed. R. Civ. P. 2(b). Thus, the Magistrate Judge properly denied Smania's Motion for More Definite Statement.[10]

F. Order (Doc. 48) Denying Smania's Motion to Strike (Doc. 45) Benjamin's Declaration

In her Motion (Doc. 45), Smania asked the Court to strike Benjamin's Declaration (Doc. 29), which was filed in support of the Motion to Dismiss (Doc. 27), as being impertinent and scandalous and because it was not acknowledged by a notary. The Magistrate Judge declined to strike the Declaration (see Doc. 48), finding that it a notary acknowledgment was not necessary and that it was not impertinent or scandalous. After reading the Declaration and reviewing 28 U.S.C. § 1746, which governs unsworn declarations, the Court finds that Benjamin's Declaration is in full compliance with § 1746 and should be given full force and effect. Furthermore, there is nothing impertinent or scandalous contained in the Declaration. Thus, there was no error in the Magistrate Judge's ruling.

IV. CONCLUSION

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[10] The Magistrate Judge treated the remainder of Smania's Motion as a memorandum in opposition to Abrams' and Abrams and Chapman's Motion to Dismiss, which this Court chose to also do. See Order (Doc. 59).

Based on the foregoing, it is therefore

ORDERED AND ADJUDGED that the Plaintiffs Motion for Certification of an Interlocutory Appeal (Doc. 54) and Plaintiffs pro se Notice of Intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52), which this Court elected to treat as objections to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Dcc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying Plaintiffs various motions are OVERRULED.

DONE and ORDERED in Chambers, Orlando, Florida this 4th day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 JUN - 5 PM 2:04
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-3IJGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause comes before the Court on Plaintiff's pro se Motion for Certification of an Interlocutory Appeal (Doc. 54), Plaintiff's pro se Notice of intent to Appeal and Withdrawal of Consent to Magistrate's Jurisdiction (Doc. 52), Plaintiff's Motion to Compel a Response (Doc. 57) to her Motion for Certification (Doc. 54), and Defendants' Response (Doc. 58). In her Motion and Notice, Plaintiff asks this Court to certify an interlocutory appeal to the Eleventh Circuit Court of Appeals on the Magistrate Judge's Endorsed Order (Doc.

31) and this Court's subsequent Order correcting a clerical error in that Endorsed Order (Doc. 37). However, a careful reading of Plaintiff's Motion and Notice reveals that Plaintiff is objecting to the Magistrate Judge's Endorsed Order (Doc. 31), his treatment of her Certificate of Interested Persons and Corporate Disclosure Statement (Doc. 4) as a motion for recusal, and his subsequent Order (Doc. 43) denying Plaintiffs various motions. Accordingly, pursuant to Rule 72 of the Federal Rules of Civil Procedure and Local Rule 6.02, this Court will treat Plaintiffs Motion and Notice as objections to the Magistrate's Orders and will make a *de novo* determination on the issues based upon the complete record.[1]

It is therefore

ORDERED AND ADJUDGED that

(1) Plaintiff's Motion for Certification of an interlocutory Appeal (Doc. 54) is **DENIED** only to the extent its seeks such certification. Otherwise, it and Plaintiff's Notice (Doc. 52) will be treated as objections to the orders of the Magistrate Judge (Docs. 31 & 43).

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[1] It should be noted that neither Plaintiff nor the Defendants in this case have consented under Federal Rule of Civil Procedure 73 to a trial of all issues by the Magistrate Judge. Rather, the motions which were ruled upon by the Magistrate Judge were referred to him by this Court under Federal Rule of Civil Procedure 72(a), which provides for magistrate judges to hear pre-trial matters consistent with their limited jurisdiction under 28 U.S.C. § 636(b)(l)(A). No consent by the parties is required for matters referred to a magistrate judge under ° 636(b)(l)(A) and Rule 72.

(2) Plaintiff's Motion to Compel a Response (Doc. 57) is **DENIED** as moot.

(3) Further, Plaintiff and Defendants are advised that this Court, not the Magistrate Judge, will take under advisement the pending dispositive motions for dismissal (Docs. 26 & 27) filed by the Defendants and will render a written opinion on such after considering the complete record including Plaintiff's Motions (Docs. 43 & 44).

DONE and **ORDERED** in Chambers, Orlando, Florida this 3 day of June, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 MAY 27 PM 2:48
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,
-vs- Case No. 6:03-cv-104-Orl-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERT,
Defendants.
_____/

Order To Show Cause

The Plaintiff is directed to show cause by a written response filed within eleven days why this case should not be dismissed pursuant to Local Rule 3.10 for lack of prosecution due to the non-filing of a Case Management Report within the time prescribed by Local Rule 3.05. Failure to respond may result in a dismissal of this action without further notice.

DONE and ORDERED in Chambers at Orlando, Florida, on this 27 day of May, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 APR 24 PM 3:13
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

- vs - Case No. 6:03-cv-104-OrI-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause came on for consideration without oral argument on the following motions:

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST ABRAMS AND CHAPMAN (Doc. No. 18)
FILED: March 27, 2003
REFERRED: April 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST SHERWIN ABRAMS (Doc. No. 19)
FILED: March 27,2003
REFERRED: AprIl 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST LAWRENCE BENJAMIN (Doc. No. 20)
FILED: March 27, 2003
REFERRED: April 11, 2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST LAWRENCE RICHMAN (Doc. No. 21)
FILED: March 27,2003
REFERRED: April 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION TO RECOVER COSTS FOR SERVICE (Doc. No. 25)
FILED: March 31, 2003
REFERRED: April 11,2003

THEREON it is ORDERED that the motion is DENIED.

MOTION: PLAINTIFF'S MOTION TO RECOVER COSTS OF SERVICE (Doc. No. 43)
FILED: April 11,2003
REFERRED: April 16,2003

THEREON it is ORDERED that the motion is DENIED to the extent is seeks to recover costs for service; otherwise, the motion, which argues against defendants' motion to dismiss (Doc. No. 27), is treated as a memorandum in opposition to defendants Neal, Gerber & Eisenberg, Lawrence Benjamin, and Lawrence Richman's motion to dismiss (Doc. No. 27).

MOTION: PLAINTIFF'S MOTION FOR MORE DEFINITE STATEMENT (Doc. No. 44)
FILED: April 11,2003
REFERRED: April 16,2003

THEREON it is ORDERED that the motion is DENIED to the extent it asks for a more definite statement relating to a motion to dismiss; otherwise, the motion, which argues against defendants' motion to dismiss (Doc. No. 26), is treated as a memorandum in opposition to defendants Abrams and Abrams and Chapman's motion to dismiss (Doc. No. 26).

I. THE LAW

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the civil rules, and that fact is made to appear by affidavit or otherwise, the Clerk enters the party's default. Fed. R. Civ. P. 55 (a) (emphasis added). The clerk's entry of default is the official recognition that the party is in default. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996). The entry of default is a prerequisite for the entry of judgment upon that default. It is, in effect, similar to a finding of liability with the entry of final judgment yet to

come. *Alameda v. Secretary of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 n. 3 (1st Cir. 1980). Local Rule 1.07 (b) of the Middle District of Florida specifically states:

> When service of process has been effected but no appearance or response is made within the time and manner provided by Rule 12, Fed.R. Civ.P., the party effecting service shall promptly apply to the Clerk for entry of default pursuant to Rule 55(a), and shall then proceed without delay to apply for ajudgment pursuant to Rule 55 (b), failing which the case shall be subject to dismissal sixty (60) days after such service without notice and without prejudice....

Local Rule 1.07 (emphasis added) (citations omitted).

Rule 55 (b)(2) further provides:

> In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter

> judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

The mere entry of a default by the Clerk does not in itself warrant the entry of a default judgment by the Court. Rather, the Court must find that there is a sufficient basis in the pleadings for the judgment to be entered. *Nishimatsu Construction v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cu. 1975). A default judgment cannot stand on a complaint that fails to state a claim. *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997), citing *Nishimatsu*, 515 F.2d at 1206. A default judgment has the effect of establishing as fact the plaintiff's well-pleaded allegations of fact, and bars the defendant from contesting those facts on appeal. *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987), citing *Nishimatsu*, 515 F.2d at 1206.

II. DISCUSSION

A. Plaintiff's Motions for Default Judgment (L)oc. Nos. 18, 19, 20, and 21)

Plaintiff contends that defendants Abrams, Abrams and Chapman, Benjamin, and Richman have defaulted because they did not respond to her complaint by March

24, 2003. According to Fed.R.Civ.P. 55 (a) and Local Rule 1.07 (b), a default must be entered prior to the entry of default judgment. Plaintiff failed to apply to the Clerk for entry of default prior to filing any of her motions for default judgment. Accordingly, plaintiffs motions for default judgment at Docket Nos. 18, 19, 20, and 21 are **DENIED**. Additionally, the Court notes that defendants Lawrence Benjamin and

Lawrence Richman have timely responded to the Complaint pursuant to this Court's orders granting defendants' motions for extensions of time. *See* Docket Nos. 3 land 37.

B. Plaintiff's Motions to Recover Costs for Service (Doc. Nos. 25 and 43).

In her motion at Docket No. 25, plaintiff seeks to recover costs incurred in serving defendants Benjamin and Richman pursuant to Fed.R.Civ.P. 4 (d)(2).[1] However, plaintiff failed to comply with Local Rule 3.01 (g).[2] Additionally, plaintiff submitted no proof of the

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[1] Fed.R.Civ.P. 4 (d)(2) provides in pertinent part:

> ... if a defendant located within the Untied States fails to comply with a request for waiver made by a plaintiff located within the Untied States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause of the failure be shown.

[2] Local Rule 3.01(g) requires the following:

amount and description of costs she seeks. Accordingly, plaintiffs motion to recover costs (Doc. No. 25) is **DENIED** without prejudice to refile *at the conclusion of the case*.

Plaintiffs renewed motion to recover costs of service (Doc. No. 43) in actuality is plaintiff's memorandum in opposition to defendants Neal, Gerber & Eisenberg's, Lawrence Benjamin's, and Lawrence Richman's motion to dismiss. See Docket No. 43 at 1. Plaintiff makes absolutely noargument in support for costs. Rather, in the last paragraph of her "motion," plaintiff asks that in addition to denying defendants' motion to dismiss, the Court award plaintiff the costs for service on defendants Richinan and Benjamin. See Docket No.43 at 6. Accordingly, plaintiffs renewed motion to recover costs of service (Doc. No. 43) is **DENIED** as moot the extent is seeks to recover costs for service; otherwise, the motion is treated as a memorandum in opposition to defendants Neal, Gerber & Eisenberg's, Lawrence Benjamin's, and Lawrence Richman's motion to Dismiss.

> Before filing any motion in a civil case. . .the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement (1) certifying that the moving counsel has conferred with opposing counsel (2) stating whether counsel agree on the resolution of the motion. A certification to the effect that opposing counsel was unavailable for a conference before filing a motion is insufficient to satisfy the parties' obligation to confer.

C. Plaintiff's Motion for a More Definite Statement (Doc. No. 44)

Plaintiff's motion for a more definite statement (Doc. No. 44) is directed at defendant Abrams and Abrams & Chapman's motion to dismiss the complaint (Doc. No. 26). Plaintiff claims that pursuant to Fed.R.Civ.P. 12 (e), she requires more specificity as to certain statements made in Abrams's affidavit in support of the motion to dismiss. *See* Docket No. 44 at 1 - 2. Plaintiff is mistaken.

A motion for more definite statement is available to a party when a pleading is so vague or ambiguous that a responsive pleading cannot be framed. *See* Fed. Rul Civ. P. 12 (e). In such a situation, the responding party may move the court for an order directing the pleader to serve a more definite statement. Pleadings consist of a complaint and answer, a reply to a counterclaim or an answer to a cross-claim. *See* Fed.R.Civ.P. 7 (a). Significantly, a motion is not a pleading. *See* Fed.R.Civ.P. 7(b). Accordingly, plaintiff's motion for a more definite statement is **DENIED** to the extent it seeks a more definite statement from Abrams's affidavit; otherwise, the "motion" shall be treated as a memorandum in opposition to Abrams and Abrams & Chapman's motion to dismiss the complaint.

D. Plaintiff's Motion to Strike Declaration of Lawrence Benjamin (Doc. No. 45)

Plaintiff claims that Lawrence Benjamin's declaration at Docket No. 29 should be stricken under Fed.R.Civ.P. 12 (f) because it is impertinent and scandalous. Plaintiffs further claims that the declaration should be stricken because it was not signed under oath with notary

acknowledgment. Plaintiff is wrong.

This Court has carefully reviewed Benjamin's declaration and finds that it is not impertinent or scandalous. Additionally, Benjamin declared "under penalty of perjury that the foregoing[declaration] is true and correct." Docket No. 29 at 7. Pursuant to 28 U.S.C. § 1746, an unsworn declaration has the full force and effect of a sworn declaration and affidavit:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unswom declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths:
"I declare (or certify, verify, or State) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

28 U.S.C. § 1746.

Benjamin's signed and dated declaration fully complies fully with 28 U.S.C. § 1746.

is **DENIED**.

DONE and **ORDERED** this 24th day of April, 2003.

/s/ JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

Copies furnished

Counsel of Record
Unrepresented Parties

FILED
03 APR 4 PM 4:39
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-Orl-31JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

The case is before the Court *sua sponte.* The Defendants Lawrence Richman and Lawrence Benjamin filed a Motion to Extend Time to Respond to Complaint (Doc. No. 17) on March 26, 2003. In their Motion, the defendants asked for an extension to April 31, 2003. However, there is not 31 days in April. The Magistrate Judge endorsed stamped the Motion granting it on April 1, 2003 (Doc. No. 31). The Court **VACATES** that Order (Doc. No. 31) and hereby **GRANTS** the defendants' Motion to Extend Time (Doc. No. 17) giving the defendants' Richman and Benjamin until May 1, 2003 in

which to respond to the Plaintiff's Complaint.

DONE and **ORDERED** in Chambers, Orlando, Florida this 4th day of April, 2003.

/s/ GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

FILED
03 MAR 28 PM 4:40
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY ANN SMANIA,
Plaintiff,

-vs- Case No. 6:03-cv-104-OrI-19JGG

SHERWIN ABRAMS,
ABRAMS AND CHAPMAN,
LAWRENCE BENJAMIN,
LAWRENCE RICHMAN,
NEAL, GERBER AND EISENBERG,
Defendants.
_____/

ORDER

This cause came on for hearing on March 25, 2003 on the following motion:

MOTION: PLAINTIFF'S CERTIFICATION OF INTERESTED PERSONS [DOCKET NO.4] TREATED AS A MOTION FOR RECUSAL UNDER 28 U.S.C. § 455 (Doc. No.7)

FILED: February 24,2003

THEREON it is **ORDERED** that the motion is **DENIED.**

I. BACKGROUND

On January 27, 2003, plaintiff Mary Ann Smania, proceeding *pro se*, filed this legal malpractice action against three attorneys and two law firms. *See* Docket No. 1, Complaint. On February 3, 2003, Smania filed a certificate of interested persons. In that certificate, Smania claims that "there is a basis for the recusal of Magistrate Judge James G. Glazebrook." Docket No. 4 at 2. Specifically, Smania claims that recusal is warranted due to Judge Glazebrook's comments relating to the State Bar while presiding over the case of *Norma Vaughan v. Kenneth Apfel, Commissioner of Social Security*, Case No. 6:99-cv-148 1-1 8JGG.[1]

On February 24,2003, the undersigned treated the certificate of interested persons as a motion to recuse, and set the matter for a hearing on March 25,2003. See Docket No. 7. Smania and counsel for the defendants appeared at the hearing. Counsel for the defendants took

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[1] In the Vaughan case, Smania, a non-lawyer, attempted to represent the plaintiff, NormaVaughan. The undersigned struck Vaughan's initial complaint because it was signed by Smania who had been enjoined from the unlicensed practice of law. See Docket Nos. 14 and 31,Case No. 6:99-cv-1481-I8JGG. The undersigned also prohibited Smania from representing Vaughan and referred Smania's unauthorized practice of law to the Florida Bar. See June 19, 2000 Endorsed Order, Case No. 6:99-cv- 1481-1 8JGG.

no position on the recusal issue. Smania argued that the Court had prejudiced her by treating the certificate as a motion she had not filed, and by holding the hearing.

II. RECUSAL

Section 455 (a) of28 U.S.C. states that"(a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The goal of section 455(a) is to avoid even the appearance of partiality. Actual bias is not necessary; the appearance of bias is adequate to trigger recusal under §455. *See Liteky v. United States*, 510 U.S. 540, 548 (1994).

The standard is whether ajudge should disqualify himself because a reasonable person, fully informed of the relevant facts, would question the judge's impartiality. *Parrish v. Board of Commissioners*, 524 F.2d 98, 103 (5th Cir. 1975) (holding that § 455 (a) involves a "reasonable man test"); *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation, then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case, or because the judge is pure in heart and incorruptible. *Liljeberg, Jr., v. Health Services Acquisition Co.*, 486 U.S. 847 (1988). Cases within § 455 (a) are extremely fact driven, and must be judged on their unique facts and circumstances more than by comparison to situations considered in prior jurisprudence. *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995). If the question of whether § 455 (a) requires disqualification is a close one, the balance tips in favor of recusal. *United States v. Dandy*, 998 F.2d 1344,

1349 (6th Cir. 1993).

Section 455 (a), however, must not be construed so broadly that it becomes presumptive, and recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice. *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986). Neither is the statute intended to bestow a veto power over judges, or to permit "judge-shopping." *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993). Disqualification is not warranted merely by a litigant's intemperate and scurrilous attacks. *United States v. Studley*, 783 F.2d 934(9thCir. 1986); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir.1977).

It has long been established that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge. Otherwise, "every man could evade the punishment due to his offense, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion." *Standing Committee v. Yagman*, 55 F.3d 1430, 1443 - 44 (9th Cir. 1995). *See also United States v. Wolfson,* 558 F.2d 59, 62 (2d Cir. 1977) (defendant's unfounded charges of misconduct againstjudge did not require disqualification because defendant's remarks established only the defendant's feelings towards the judge, and not the reverse).

Further, a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require. *Greenspan*, 26 F.3d at 1005; *In re American Ready Mix, Inc.*, 14 F.3d at 1501; *Hinman*, 831 F.2d at 939. The United States Court of Appeals for theTenth Circuit compiled a non-exhaustive list of matters not ordinarily sufficient to require § 455 (a) recusal:

(1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that ajudge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or anot her proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.

Cooley, 1 F.3d at 993 - 94 (emphasis added).

III. APPLICATION

This Court has considered whether to recuse under 28 U.S.C. § 455 (a) on its own motion. In Smania's certificate of interested persons, and during this Court's March 26, 2003 hearing on this matter, Smania claimed that the undersigned's prior ruling - prohibiting her from representing plaintiff Vaughan - shows that the undersigned has a bias against non-attorneys and shows

that the undersigned is partial to members of the Florida Bar. Smania is wrong.

The undersigned has no personal bias or prejudice concerning Smania or concerning non-lawyers. Although it is illegal for a non-lawyer to represent an individual in this Court, it is perfectly appropriate for a non-lawyer to proceed *pro se* on her own behalf. The Court does what it can toaccommodate *pro se* litigants. In this case, Smania represents only herself. The undersigned judge has as strong a duty to sit in this case because there is no legitimate reason to recuse. No reasonable person, fully informed of the relevant facts, would question the undersigned judge's impartiality. Section 455 (a) is not intended to bestow a veto power over judges, or to permit "judge-shopping." Accordingly, Smania's certificate of interested persons, treated as a motion to recuse [Docket No. 4], is **DENIED**.

III. CONCLUSION

For the above reasons, it is

ORDERED that plaintiff Mary Ann Smania's Certificate of Interested Persons, treated as a Motion to Recuse [Docket No. 4] is **DENIED**.

DONE and ORDERED this 28th day of March, 2003.

/s/ JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

Copies furnished

Counsel of Record
Unrepresented Parties